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Supreme Court of the United States

OCTOBER TERM, 1949

No. 604

TEX-O-KAN FLOUR MILLS COMPANY, D/B/A
PERRY BURRUS ELEVATORS,

Petitioner,

v.

TEXAS AND PACIFIC RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND SUPPORTING BRIEF

By RALPH W. CURRIE,
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Date: February 9, 1950.

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v.

TEXAS AND PACIFIC RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

The Tex-O-Kan Flour Mills Company, appellant below in No. 12762, Tex-O-Kan Flour Mills Company v. Texas and Pacific Railway Company, requests a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Supporting such request, it shows:

SUMMARY STATEMENT OF MATTERS INVOLVED

This case involves the correct construction of a freight tariff published in compliance with orders of the Interstate Commerce Commission, in so far as it names the charges applicable on 71 cars of grain shipped from south Texas

stations to Dallas, Texas, there stored in transit, and later exported through the port of Galveston, Texas, moving on through joint rates applicable via the transit point.

The controversy involves the sum of $1,263.63 which was originally refunded to shipper by the railroad in response to over charge claims properly filed. Later the railroad sued to recover the charges refunded on said cars and on 42 other cars on which the trial court found refunds were barred by the statute of limitation. Judgment for plaintiff was rendered on 71 cars for $1,263.63, plus interest and costs.

Defendant, Tex-O-Kan Flour Mills Company appealed to the Circuit Court for the Fifth Circuit. That court on December 6, 1949, affirmed the judgment of the trial court. Appellant's motion for rehearing was denied January 3, 1950.

BASIS FOR JURISDICTION

The Federal District Court had original jurisdiction because the controversy arose under an act of Congress regulating the transportation of foreign commerce. (28 U. S. C. A. 1337.) The Court of Appeals for the Fifth Circuit had jurisdiction of the appeal under 28 U. S. C. A. 1291 and 1294(1). This court has jurisdiction under the provision of 28 U. S. C. A. 1254. This petition is filed within the time provided in 28 U. S. C. A. 2101(c).

BASIS FOR GRANTING WRIT

A writ of certiorari should be granted as prayed for because:

1. The circuit court has decided an important question of federal law in conflict with decisions of this court and decisions of circuit courts in other circuits in the following cases:

Great Northern Railway v. Delmar Company, 283 U. S. 686;

Jensen-Salsbery Laboratories, Inc. v. O. M. Franklin Blackleg Serum Co., 10th Cir., 74 F. (2d) 501;

United States v. Gulf Refining Co., 268 U. S. 542;

Union Wire Rope Corporation v. A. T. & S. F. Ry., 8th Cir., 66 F. (2d) 965;

Van Dusen Harrington v. Northern Pacific Ry. Co., 8th Cir., 32 F. (2d) 466.

2. The circuit court decision, if not corrected, will nullify the decisions and orders of the Interstate Commerce Commission, in so far as they require the grouping of Galveston, Houston and Texas City, in the following cases:

Consolidated Southwestern Cases, 205 I. C. C. 601;

Nueces County Navigation District No. 1 v. Abilene & Southern Railway Company, 251 I. C. C. 15;

Port Commission of Beaumont v. Abilene & Southern Railway Co., 251 I. C. C. 137;

Rate Structure Investigation, Part III, Cotton, 165 I. C. C. 595.

3. Public interest requires that the circuit court's opinion be revised and that the tariffs be construed so as to conform with outstanding valid orders of the Interstate Commerce Commission and with prior decisions of this court. The importance of that opinion is not reflected by the

small amount here in controversy. Large investments at Galveston and Texas City, Texas, will be jeopardized by this opinion if it is not corrected.

SPECIFICATION OF ERRORS

I.

The Circuit Court erred in refusing to hold that the mileage used in figuring all freight charges to be assessed under the provisions of Item 980-E, Texas Lines Tariff 61-D, must be determined in the same manner.

II.

The Circuit Court erred in refusing to hold that the mileage used in figuring freight charges to be assessed under the provisions of Item 980-E, Texas Lines Tariff 61-D, must be determined in the manner provided in Item 105-A of said Tariff 61-D.

III.

The Circuit Court erred in refusing to apply to the freight tariff here under consideration the rule that, where a tariff is susceptible of two constructions, it will be construed strictly against the railroad publishing the tariff.

IV.

The Circuit Court erred in refusing to apply to the tariff here under consideration the rule that, where a freight tariff is susceptible of two constructions, one of which would conform with an order of the Interstate Commerce Commission and the other of which would violate such order, the construction conforming with the Commission's order must be adopted.

SUPPORTING BRIEF

POINT ONE

(Germane to First Specification of Error)

Short-line distances used in determining charges applicable under two similar clauses appearing in the same item of a tariff must be figured in the same way.

The grain in question originated at South Texas stations, was stored in transit at Dallas, Texas, and reshipped for export through the port of Galveston, Texas. The rates and charges applicable thereto are found in Item 980-E, Texas Lines Tariff 61-D, shown on pages 35 and 36 of the transcript of record. That item contains two provisions that are important, both of which are in Paragraph b-1, of Item 980-E.

The first provision is as follows:

> "When the combined short-line distance from initial point of origin to final destination via transit point * * * exceeds 350 miles, the through rate protected shall be that applicable for such combined short-line distance * * *." (R. 35-36.) *

The second provision reads as follows:

> "extra service shall be determined as follows: Ascertain the mileage via the shortest possible route wholly within Texas from the original point of shipment to final destination, and subtract same, but not less than 350 miles, from the mileage via the shortest possible route, wholly within Texas, from the original point of

* The Circuit Court apparently assumed that Item 105-A tells how to to figure the rate via the transit point. That was an incorrect assumption. Item 105-A simply provides that the distance to any point in the Houston, Galveston, Texas City Group shall be the distance to Houston plus 15 miles.

> shipment to final destination through the transit point or through each successive transit point when more than one transit privilege is taken. The difference thus ascertained in excess of 300 miles will represent the extra service for which an additional charge shall be made as follows:" (R. 36)
>
> (Here follows a list of charges to be made when the difference in mileage so ascertained exceeds 300 miles)

The Circuit Court held that the short-line distance from origin to final destination (Galveston) must be determined under the first provision by using the distance to Houston plus 15 miles. It held that the mileage via the shortest possible route from origin to final destination (Galveston) must be determined under the second provision by using the distance to the freight depot in Galveston. Both provisions occur in the same paragraph of the same item of the same tariff.

Provision No. 1 uses the term "short-line distance". Provision No. 2 uses the term "mileage via the shortest possible route". They both mean the same thing. The distance or mileage referred to in Provision No. 1 must be the same as the distance or mileage referred to in Provision No. 2. If the distance to Galveston under Provision No. 1 is the distance to Houston plus 15 miles, the mileage to Galveston under Provision No. 2 must also be the distance to Houston plus 15 miles. If Provision No. 2 contemplates mileage to the Galveston freight depot, Provision No. 1 also contemplates distance to the Galveston freight depot.

There is nothing in Item 980-E indicating how the distance or mileage shall be determined but the manner in which it is determined in one provision must be followed in

the other. The same word occurring more than once in a contract or tariff must be given the same meaning unless the context clearly indicates that it was used in a different sense. Words used in a certain sense in one part of a document must be used in the same sense in another part unless the context indicates otherwise. *Jensen-Salsbery Labratories, Inc. v. O. M. Franklin Blackleg Serum Co.*, 10th Cir., 74 F. (2d) 501, 502.

POINT TWO

(Germane to Second Specification of Error)

The provisions of Item 980-E, Tariff 61-D, are all governed by Item 105-A of the same tariff.

Item 105-A provides that, where the rate making distance to Houston is 150 miles or more, as is the case here, the rates to Galveston will be determined by using the distance to Houston plus 15 miles. (R. 39.)

> " 'Rates' as used in the Act has reference to charges for the carriage of freight." *Kansas City Southern Railway Co. v. Kansas City Terminal Railway Company*, 211 I. C. C. 291, 297.
>
> " 'Rate', 'fare' and 'charge', broadly speaking, denote the compensation of the carrier." *Stopping of Cars in Transit*, 36 I. C. C. 130, 132.

The term "rate" used in Item 105-A, therefore, must be construed to cover the rate figured under Provision 1 of Item 980-E and the extra service charge figured under Provision 2 thereof.

In construing a tariff, the entire instrument must be visualized and effect given to every word, clause and sentence. *Van Dusen Harrington v. Northern Pacific Ry. Co.*,

8th Cir., 32 F. (2d) 466. Specific provisions, qualifying and supplying exceptions to the general provisions, must be retained and given effect wherever possible. *Pillsbury Flour Mills Co. v. Great Northern Railway Co.*, 8th Cir., 25 F. (2d) 66. Item 980-E provides that the charges shall be determined by using short line distance or mileage direct and through the transit point. Item 105-A provides how that distance shall be determined.

The shipments in question were exported over the docks at Galveston. They did not move through the Galveston freight depot. There is no authority for using the distance to the Galveston freight depot, or any other constructive distance, unless specifically provided in the tariff. Item 105-A is the only item in the tariff which states how the distance shall be determined. It provides that the distance to Houston plus 15 miles shall be used on such shipments.

In determining all distances to Galveston referred to in Item 980-E, the distance to Houston plus 15 miles must be used in accordance with the provisions of Item 105-A of the same tariff.

POINT THREE

(Germane to Third Specification of Error)

If a freight tariff is susceptible of two constructions, it must be construed against the railroad or railroads publishing the tariff.

Like contracts, ambiguous tariffs must be construed against the maker. *Great Northern Railway Company v. Merchants Elevator Company*, 259 U. S. 285.

If a tariff is susceptible of two constructions, the shipper is entitled to the construction most favorable to him. *United States v. Gulf Refining Co.*, 268 U. S. 542. Authority for all charges must be found in the tariff, nothing not so found can be inferred or added thereto. *Union Wire Rope Corporation v. A. T. & S. F. Railway Co.*, 8th Cir., 66 F. (2d) 965, 969.

Item 105-A of the governing tariff provides:

> "the rates from or to Houston, Galveston and Texas City, Texas, * * * will be determined by using the distance from or to Houston, Texas, plus 15 miles." (R. 39.)

The Texas and Pacific Railway Company, one of the publishers of that tariff, contends that the word "rates" is not broad enough to include the extra service charge referred to in the second provision of Item 980-E quoted under point one hereof. As stated under Point Two, we think the word "rate" includes all charges. But, if Item 105-A is susceptible of two constructions, it must be construed against the Texas and Pacific Railway Company, one of the publishers of that tariff.

When overcharge claims were filed by the Tex-O-Kan Flour Mills Company, *Witness Henderson*, chief rate clerk in the Freight Claim Department of the Texas and Pacific Railway Company, had the rates carefully checked under his supervision and construed the provisions of Item 105-A as applying to all charges provided in Item 980-E. He, therefore, ordered the overcharge claims paid. (R. 29-30.) Under that construction of the tariff the shipper paid a penalty ranging from 10 cents per 100 pounds to 15 cents

per 100 pounds on 7,796,220 pounds* for the out-of-route service through Dallas. (R. 42, 50.)

At the trial *Witness Henderson* testified that he had changed his mind and was of the opinion that the provisions of Item 105-A are not applicable to charges for extra service covered by the second clause of Item 980-E hereinbefore quoted. (R. 30.) An assistant freight traffic manager of one railroad construed Item 105-A as covering all charges (R. 53-54), while the assistant freight traffic manager of the Texas and Pacific Railway Company testified (R. 9-14) that it does not apply to the extra service charge of $1,263.63.

If a freight tariff is ambiguous, or is susceptible of two meanings, the shipper may construe the language the most favorable way to himself which the terms permit. *Atlantic Coast Line Railway Company v. Atlantic Bridge Company*, 57 F. (2d) 654-655.

POINT FOUR

(Germane to Fourth Specification of Error)

If a freight tariff is susceptible of two constructions one of which creates a lawful rate and the other an unlawful rate, it must be constructed so as to conform with the law.

Where two constructions of a freight tariff are possible, preference must be given to that construction which does not result in violation of law. *Great Northern Railway v. Delmar Company*, 283 U. S. 686. As construed by the circuit court, the tariff here under consideration di-

* The record does not show the exact amount of this penalty but it would be between $7,796.00 and $11,694.00.

rectly violates the decisions and orders of the Interstate Commerce Commission in that it will result in a higher rate to Galveston than to Houston.

In *Rate Structure Investigation, Part III, Cotton*, 165 I. C. C. 595, the Interstate Commerce Commission found that Houston, Galveston and Texas City should be grouped as one terminal district or port. It further ordered that the distance to be used in assessing charges to and from that district should be the distance to or from Houston, plus 15 miles.

In the *Consolidated Southwestern Cases*, 205 I. C. C. 601, the Commission held that the rates and charges to Galveston, Houston and Texas City should be based on the short-line distance to Houston plus 15 miles. At pages 636-637, it said:

> "So far as these three cities are concerned the bulk of the traffic moves to or from Houston. Because neither Houston nor either of the two other cities is geographically or in volume of traffic representative of this terminal district, no one of them can properly be taken as the rate-basing point without modification. In view of this situation, we conclude that the group rates may be arrived at by adding 15 miles to the short-line distance between Houston and any given point."

In *Port Commission of Beaumont v. Abilene and Southern Railway Co.*, I. C. C. Docket 28235, 251 I. C. C. 137, the Commission made the following statement with reference to the rates to Houston, Galveston and Texas City:

> "The rates there under consideration grouped these ports for distances over 150 miles from Houston. There

> is nothing in this record to show that the basis prescribed in the *Consolidated Southwestern Cases, supra*, for constructing group class rates by adding 15 miles to the Houston distances is improper. That basis is therefore adopted herein for both class and commodity traffic." (166.)

In *Nueces County Navigation District v. Abilene & Southern Railway Co.*, I. C. C. Docket 28259, 251 I. C. C. 115, 134, the Interstate Commerce Commission reaffirmed its decision in Docket 28235 and held that the grouping of these ports on basis of the distance to Houston, plus 15 miles, should apply on all class and commodity traffic moving from Texas interior points to Texas ports for export.

Item 105-A was published in an effort to comply with the Commission's order in Dockets 28235 and 28259, *Port Commission of Beaumont v. Abilene and Southern Railway*, 251 I. C. C. 137 and *Nueces County Navigation District v. Abilene & Southern Railway Co.*, 251 I. C. C. 115, 134. The tariff so shows. (R. 38.) If either or both of the implementing clauses shown in Item 980-E are construed so to base charges applicable through Galveston on distances which exceed Houston plus 15 miles, said clauses would be in violation of the Commission's orders in Dockets 28235 and 28259.

If the language of Item 980-E could reasonably be construed to require the use of a distance greater than Houston plus 15 miles on traffic moving through Galveston,

such construction would make the item unlawful. The entire item must, therefore, be construed as subject to Item 105-A so as to make it conform with the orders of the Interstate Commerce Commission in Dockets 28235 and 28259.

PRAYER

WHEREFORE, petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals, Fifth Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named a transcript of the record and proceedings herein; that the decree of the Circuit Court be reversed by this Honorable Court; and that, your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

RALPH W. CURRIE,
FRANK A. LEFFINGWELL,
Attorneys for Petitioner.

Date: February 9, 1950.

Address: 1013 Praetorian Building,
Dallas 1, Texas.

Certificate of Service

I hereby certify that I have this day mailed a copy of this petition to Messrs. Robertson, Jackson, Payne, Lancaster and Walker, the attorneys for the respondent, at their offices in the Republic Bank Building in the City of Dallas, Texas. I further certify that said attorneys have already been furnished a copy of transcript of record, a copy of the decision of December 6, 1949, by the Court of Appeals, a copy of appellant's motion for rehearing December 22, 1949, and a copy of the order January 3, 1950, denying such rehearing.

Witness my hand this the 9th day of February, 1950.

.....

FRANK A. LEFFINGWELL,
Of Counsel.